No. 86-324

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In The

# Supreme Court of the United States

October Term, 1986

ARTHUR AMADOR,

*Petitioner,*

*vs.*

DEPARTMENT OF TRANSPORTATION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTION PRESENTED

When a Court of Appeals adopts a factual finding made by the administrative agency which has been challenged as not being supported by substantial evidence, must the court reveal whether it believes the finding to have been supported by substantial evidence or to be immune from challenge under that test?

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DEPARTMENT OF TRANSPORTATION,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner Arthur Amador respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on April 17, 1986.

## OPINION BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The decision of the Merit

Systems Protection Board, from which review by the Court of Appeals was sought, is unreported and appears as Appendix C to this petition.

## JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 17, 1986. A timely petition for rehearing was denied on May 29, 1986, and this petition for certiorari was filed within 90 days of that date. This court is given jurisdiction to review the judgment of the Court of Appeals by 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 7701

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—
>
> (1) to a hearing for which a transcript will be kept; and
>
> (2) to be represented by an attorney or other representative.
>
> Appeals shall be processed in accordance with regulations prescribed by the Board.
>
> (b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other

employee of the Board designed by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(a) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(b) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

5 U.S.C. § 7703

(a)(1) An employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

* * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

* * *

(c) In any case filed in the United States Court for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (2) obtained without procedures required by law, rule, or regulations having been followed; or
>
> (3) unsupported by substantial evidence; . . .

## STATEMENT OF THE CASE

Mr. Amador was discharged by the Department of Transportation for participating in a strike and for being absent without leave. The Merit Systems Protection Board ("MSPB" or "board"), through a decision issued by its employee who had presided over Mr. Amador's hearing, found that he had engaged in a strike and had been absent without leave on August 3 and August 6, 1981, and upheld the discharge. That finding was affirmed by the Court of Appeals, which has jurisdiction under 5 U.S.C. § 7703 to review MSPB decisions.

### The Strike and the Amnesty

A strike of air traffic controllers began at 7:00 a.m. Eastern Daylight time on August 3, 1981 (App. 9). Four hours later President Reagan announced that no one would be discharged for being on strike that day or for the subsequent 48 hours, as long as he or she did then report to work (App. 10). The deadline for each controller was his or her first regularly-scheduled shift after the expiration of 48 hours from the time of the president's announcement:

> Because of differences in shift schedules and time zones, the agency allowed controllers to return to work at the time of regularly-scheduled shifts that began after 11:00 a.m., on August 5, 1981.

*Adams v. Dept. of Transportation,* 735 F. 2d 488, 490 (Fed. Cir. 1984).

In this case, "The 7:00 p.m. shift on August 6, was appellant's amnesty deadline shift." (App. 97)

**Consequence of Agency Belief that a Controller Missed His Deadline.**

Once the agency officials determined that an employee had missed his deadline shift, they refused to allow him to report to any subsequent shift:

> [A]ppellants would not have been allowed to report to work after missing their deadline shifts.

(App. 34).

There were cases in which the agency erroneously determined that an employee had missed his deadline shift, usually because the agency had failed to note that the employee had been on leave or on his regular day off. When it discovered its error, the agency would rescind its original discharge notice (which had charged a failure to report to an erroneously designated deadline shift), but then would issue a new discharge notice charging that the employee had failed to report to his actual deadline shift. In those cases, the MSPB systematically reversed the discharges, holding that it was unfair to discharge an employee for failing to report to a shift which the agency had decided he would not be allowed to report to. *Johnson v. Dept. of Transportation,* 17 M.S.P.R. 387 (1983), *Bangerter v. Dept. of Transportation,* 16 M.S.P.R. 670, 699 (1983), *Adler v. Dept. of Transportation,* 18 M.S.P.R. 277, 179 (1983), *Andrews v. Dept. of Transportation,* 18 M.S.P.R. 364, 368 (1983), and *Edwards v. Dept. of Transportation,* 17 M.S.P.R. 405 (1983).

**August 5 Discharge Notice**

It is undisputed that on August 5 the agency sent Mr. Amador

two copies of a letter, one by certified mail and the other by first class mail, proposing to discharge him for striking, and charging specifically that he had wrongfully refused to report to a shift at 2:00 p.m. August 5 (Jt.App. 69).[1] The August 5 discharge notice was not rescinded until August 11, when it was replaced by a notice lacking the charge that Mr. Amador had wrongfully refused to report to a shift on August 5 (Jt.App. 71).

**Claimed Reliance on the August 5 Discharge Notice.**

Mr. Amador testified at the MSPB hearing that he did not report to his scheduled shift on August 6 because he had that day received the regular mail copy of the August 5 proposal to discharge him:

> QUESTION: Art, why didn't you go to work on August 6th?
>
> MR. AMADOR: I did not go to work because I received a notice of proposed termination—
>
> QUESTION: Okay.
>
> MR. AMADOR: —prior to the scheduled work shift.
>
> QUESTION: Okay. Was that the proposed notice in there dated August 5th.
>
> MR. AMADOR: Yes, it was.

(Jt.App. 102).

---

1. "Jt.App." refers to the Joint Appendix filed by the parties in the Court of Appeals.

**Decision of the Merit Systems Board**

The MSPB found that at his hearing Mr. Amador actually admitted to being on strike on August 6; not surprisingly, the MSPB relied on this perceived admission as proof of his guilt:

> In response to the evidence presented by the agency, *the appellant admitted that he was absent from work on August 3 and 6,* two days that he was scheduled to work. Additionally, *appellant admitted that he did not work on those dates because he was participating in a "job action" against his employer.*
>
> * * *
>
> After reviewing the evidence presented, I find that appellant has not rebutted the agency's *prima facie* case that he voluntarily participated in the strike on August 3 and 6.
>
> In reaching this decision, I am persuaded by and have relied on the following evidence: (1) the fact that appellant was scheduled for and absent from duty on August 3 and 6; (2) the fact that the above absences occurred during a period which I have found that the strike was in progress; (3) the fact that after approximately 18 months, appellant has failed to offer any excuse or explanation for his absences; and (4) appellant's admission that he participated in the "job action" which I have found was an illegal strike.

(App. 98-100). (Emphasis added.)

Having found that Mr. Amador had admitted being on strike on August 6, the board did not mention his testimony that his absence that day was actually due to his receipt of the August 5 discharge notice.

**Parties' Arguments in the Court of Appeals**

Mr. Amador argued to the Court of Appeals that since the hearing transcript did not contain an admission by him that he had been on strike on August 6, the board's finding was unsupported by substantial evidence:

> The premise of the board's decision—that Mr. Amador had admitted that his failure to work his deadline shift was the result of participating in a job action—has no substantial basis in the record.

(Pet. Brief 11).[2]

Mr. Amador identified the following as the only possible basis for the finding that he had admitted striking on August 6:

> QUESTION: Did you refuse to work commencing on the 3rd of August?
>
> MR. AMADOR: I did not work on August the 3rd.
>
> QUESTION: Did you work on August the 4th?
>
> MR. AMADOR: No, I did not.

---

2. The reference is to the "Substituted Brief for Petitioner" filed in the Court of Appeals.

QUESTION: Were you scheduled to work on the 4th?

MR. AMADOR: No, I was not.

QUESTION: Okay, moving on the 5th, did you work on the 5th?

MR. AMADOR: No, I did not.

QUESTION: Were you scheduled to work on the 5th?

MR. AMADOR: No, I was not.

QUESTION: Did you work on August 6th?

MR. AMADOR: No, I did not.

QUESTION: Were you scheduled to work on August the 6th?

MR. AMADOR: I was scheduled to work on August the 6th.

QUESTION: Now, was your failure to work on any of these dates that I've described a result of your participation in what you've called a job action?

MR. AMADOR: I would say yes.

(Jt.App. 98-9, *quoted* in Pet. Br. 7-8.)

Mr. Amador argued to the court that having just stated that

he was not scheduled to work on August 4, his "yes" answer to the "any of these dates" question clearly was intended to cover fewer than all of the dates (Pet. Br. 10). He argued further that since he had elsewhere in his testimony given a non-strike reason for his absence on August 6, the "yes" answer could not be fairly construed to cover that date any more than August 4 or 5 (Pet. Br. 10-11).

The government's brief conceded that the colloquy did not clearly constitute a statement by Mr. Amador that he was on strike on August 3, he was not on strike on August 4, he was not on strike on August 5, and he was on strike August 6; the brief argued that the MSPB's contruction should nevertheless be deferred to:

> We concede that the meaning of Mr. Amador's reply to agency counsel is open to interpretation. The presiding official interpreted it by determining that Mr. Amador had admitted that his absences on both August 3, and August 6, 1981, were due to strike participation. Jt. App. 33. In view of the presiding official's role as factfinder, and in light of the fact that the presiding official had an opportunity to hear the testimony first-hand and observe the demeanor of both the attorney posing the question and Mr. Amador, his determination regarding the meaning of that testimony is entitled to deference by this Court.

(Resp. Br. 12-3).[3]

The government did not indicate whether "deference" was short for upholding the finding if it was supported by substantial evidence or it was short for adopting the finding simply because

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3. The reference is to the Brief for Respondent in the Court of Appeals.

it had been made by the board presiding official.

Mr. Amador requested oral argument before the Court of Appeals so that government counsel could demonstrate the differing types of demeanor which would have resulted in differing interpretations of this colloquy. Response to Notice Regarding Oral Argument. The court denied the request (App. 2).

**Decision by the Court of Appeals**

The court did not allude to, much less discuss, the fact that Mr. Amador challenged as unsupported by the evidence the finding that he had admitted striking on August 6. The court simply stated as a fact that the admission had been made:

> At the hearing before the presiding official of the Board, the petitioner admitted that he was absent from work on August 3 and 6 "because he was participating in a 'job action' against his employer."

(App. 3).

The court then turned to Mr. Amador's contention that his absence had resulted from his receipt of the agency's proposed discharge notice. The court listed a number of facts which the court apparently thought would have been relevant to a decision to accept or reject that contention, and suggested that these were circumstances leading to the Merit Systems Board's finding that Mr. Amador's August 6 absence was due to striking.

> [Mr. Amador] contends . . . that the reason he missed his deadline shift was that he received by regular mail a notice of proposed removal on the morning of August 6, 1981, prior to his deadline

> shift. The receipt for notice of proposed removal dated August 5, 1981, that the agency sent to the parties by certified mail, shows that the petitioner received that notice on August 11, 1981.
>
> Petitioner did not raise the claim that he had received the notice of proposed removal prior to this deadline shift on August 6, 1981, in his written reply to the notice of proposed removal (he did not make an oral reply), in his petition for appeal filed with the Board, or in his statement of issues filed with this court. Moreover, at the Board hearing, when asked whether, prior to receiving the notice of proposed termination, he had "planned to return to work that afternoon at 2:00 p.m.," the petitioner replied "I can't answer that . . . The decision was taken out of my hands. When I received a proposed removal, termination notice, I was accused of a crime. I didn't feel like talking to anybody in there." The petitioner was on the picket line on August 5, 1986.
>
> In these circumstances, the presiding official justifiably concluded that the petitioner had "not rebutted the agency's *prima facie* case that he voluntarily participated in the strike on August 3 and 6," and that the petitioner was absent without leave on those days.

(App. 3-5).

As noted above, the circumstance that the presiding official relied on was that Mr. Amador had admitted being guilty as charged. The presiding official did not intimate any other reason for disbelieving Mr. Amador's later testimony that his absence

was actually due to receipt of the August 5 discharge letter. And, of course, what Mr. Amador submitted to the court after the Merit Systems Board issued its decision was not a circumstance which could have been considered by the Board presiding official in the first place.[4]

## REASONS FOR GRANTING THE WRIT

The writ should be granted because Mr. Amador had asked the Court of Appeals to carry out a critical function under the federal employment system—to determine whether the central finding of the Merit Systems Board was supported by substantial evidence—and the court's decision does not even reveal whether it attempted to do so.

### A. SUBSTANTIAL EVIDENCE REVIEW IS A CRITICAL FUNCTION WITHIN THE FEDERAL EMPLOYMENT SYSTEM.

In cases where it has denied relief to federal employees, this Court has laid heavy stress on the fact that they already have effective procedural protections against improper discharges:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed..

*Bush v. Lucas*, 462 U.S. 367, 386 (1983).

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4. "*Post hoc: ergo, propter hoc* is not always sound reasoning. But *Ante hoc: ergo, non propter hoc* is unanswerable." 17 Works of Macaulay 107.

Similarly, in *Arnett v. Kennedy*, 416 U.S. 134 (1974) a majority of the court refused the claim of constitutional right to a pre-termination hearing for federal employees, but in doing so stressed that the statutory right to a post-termination hearing before the Civil Service Commission (now the Merit Systems Protection Board) ensured that constitutional due process would be provided. 416 U.S. at 157 (Rehnquist, J.), 416 U.S. at 179 (Powell, J.) and 416 U.S. at 200-202 (White, J.).

One element of the scheme referred to in *Bush v. Lucas* is that the Merit Systems Board must reinstate an employee unless the government has proven its case by a preponderance of the evidence:

> To begin with, the procedure provided by the civil service scheme is in many respects preferable to the judicial procedure under a Bivens action. See Brief for Respondent 18-21. For example, the burden of proof in an action before the Civil Service Commission (now the Merit Systems Protection Board) must be borne by the agency, rather than by the discharged employee.

*Bush v. Lucas*, 462 U.S. at 391 (Marshall, J., concurring).

Another element of the scheme is that even where the board has made a finding, under the preponderance of the evidence standard, adverse to the employee, the employee can have the Court of Appeals set it aside as being unsupported by substantial evidence:

> (c) In any case filed in the United States Court for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

* * *

(3) unsupported by substantial evidence; . . .

5 U.S.C. § 7703(c)(3).

In an earlier case involving the National Labor Relations Board, this court explained the value of substantial evidence review of administrative decisions:

> Congress has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals.

*Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490 (1951).

In sum, the discharge of a federal employee cannot be upheld unless a court "invested with the authority and enjoying the prestige of the Courts of Appeals" can find that the evidence supporting board findings adverse to the employee "appears substantial when viewed on the record as a whole."

**B. MR. AMADOR MADE A NON-FRIVOLOUS ATTACK ON THE BOARD FINDING THAT HE ADMITTED BEING ON STRIKE ON AUGUST 6.**

The factual question of whether, at his hearing, Mr. Amador admitted that his absence on August 6 was a result of striking is central to this case. If Mr. Amador did admit striking on August

6, the board was correct in ignoring his other testimony and—of course—was correct in finding that the agency had proven, by a preponderance of the evidence, that he was on strike that day. Certainly where the board decision is based on an admission that was actually made, it is supported by substantial evidence.

If Mr. Amador did not admit to striking on August 6, then the board decision sustaining Mr. Amador's discharge cannot be left standing. At minimum, the case would have to be remanded to the board for consideration of the facts with the purported admission left out of the calculus.[5]

The record as a whole contained Mr. Amador's testimony that his absence on August 3 was due to the strike; that his absence on August 4 was due to that being his day off; that his absence on August 5 was due to that also being his day off; and that his absence on August 6 was due to his receipt of the August 5 discharge notice. The only evidence that Mr. Amador admitted to striking on August 6 was that when asked if he had been on strike on "any of these dates," he answered in the affirmative.

Neither the employing agency, nor the board, nor the court

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5. It is, of course, possible that Mr. Amador was guilty of striking on August 6 even though he did not admit this. Presumably because of the perceived admission, the board did not determine whether, under the circumstances, Mr. Amador's receipt of the premature discharge notice exonerated him under the *Johnson* line of cases (above, p. 7), or whether there was a basis for distinguishing Mr. Amador's case from that line.

The fourth and fifth paragraphs of the Court of Appeals opinion appear to suggest that had the board rejected Mr. Amador's *Johnson* claim, the court would have affirmed the decision. However, a court may not affirm an administrative decision based on a rationale not adopted by the administrative agency itself. *Securities & Exchange Comm. v. Chenery*, 318 U.S. 80, 88 (1943), *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168-9 (1962).

construed "any of these dates" as encompassing August 4 or 5, presumably because the record contained Mr. Amador's testimony that he was not scheduled to work those days. This is so even though the board and the court found that Mr. Amador had been scheduled for work on August 5[6] (App. 97 and App. 2). That is to say, the fact that Mr. Amador merely asserted a non-strike reason for his absence on August 5 meant that the admission of striking on "any of these dates," was not meant to cover August 5.

No reason was suggested by the court or the board for dealing any differently with August 6. That is, even if the tribunals disbelieved Mr. Amador's testimony that his absence that day was due to receipt of the premature discharge notice, the mere making of this defense made it clear that he was not admitting striking on that day. The Court of Appeals would not have been able to uphold the finding of an admission of striking on August 6 without explaining why no weight could be given to the fact that Mr. Amador had testified to a different reason for his absence that day. Since no such explanation even appears possible, Mr. Amador's argument that the board finding was unsupported by substantial evidence deserved serious treatment by the court.

## C. AN APPELLATE COURT DECISION MUST AT LEAST REVEAL WHAT STANDARD OF REVIEW WAS APPLIED RESULTING IN THE COURT'S DECLARATION OF THE FACTS.

It is not clear whether the Court of Appeals believed it could adopt the board's finding that Mr. Amador had admitted striking on August 6 without determining whether that finding was supported by substantial evidence, or whether the court determined

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6. To avoid confusion, we stress here that Mr. Amador was not found guilty of striking on August 5. The alleged strike absences were only those of August 3 and 6.

that that finding was indeed sufficiently supported. If the latter was the case, the lack of discussion makes it impossible to determine whether the court relied only on those portions of the record which supported the board's interpretation, or whether it considered the record as a whole. In short, the court here acted precisely as it had in a recent patent case in which it reviewed district court fact findings without indicating what standards of review it was applying:

> [W]hether or not the ultimate question of obviousness is a question of fact subject to Rule 52(a), the subsidiary determinations of the District Court, at least, ought to be subject to the Rule.
>
> The Federal Circuit, however, did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue. We therefore lack an adequate explanation of the basis for the Court of Appeals judgment: most importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which obviousness determinations is one of fact.

*Dennison Mfg. Co. v. Panduit Corp.*, ____ U.S. ____, 89 L. Ed. 2d 817, 821-2 (1986).

Mr. Amador was not entitled to error-free proceedings either at the administrative or judicial levels. He was entitled, however, to assurance that the Court of Appeals did review the board record and judge it according to the substantial evidence standard. As in the case just quoted, this Court should remand this case to the Court of Appeals so that there can at least be "an adequate explanation of the basis of the Court of Appeals judgment."

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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